Supreme Court, U. S.
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IN THE

United States Supreme Court

No. 77-751

GABRIEL HAGENDORFER,

Petitioner

versus

STATE OF ALABAMA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS STATE OF ALABAMA

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IN THE UNITED STATES SUPREME COURT

No.

GABRIEL HAGENDORFER,
Petitioner,

versus

STATE OF ALABAMA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

Comes now Petitioner, Gabriel Hagendorfer, and prays that a Writ of Certiorari be issued to review the judgment of the Alabama Court of Criminal Appeals entered in the above styled case on May 24, 1977.

OPINIONS BELOW

A copy of the opinion of the Alabama Court of Criminal Appeals, 1 Div. 784, rendered May 24, 1977, is appended hereto

together with a letter from said Court evidencing its denial of Petitioner's application for rehearing, and a copy of the Supreme Court of Alabama's denial of Petitioner's Petition for Writ of Certiorari to said Court, cited as SC 2710 and rendered August 26, 1977, with no opinion. The foregoing are found in this Petition's Appendix at pages 1a - .

JURISDICTION

Petitioner was convicted of the crime of unlawfully selling marijuana contrary to the provisions of the Alabama Uniform Controlled Substances Act in the Circuit Court of Baldwin County, Alabama on November 8, 1976. The Court of Criminal Appeals affirmed the judgment on May 24, 1977. An application for rehearing was filed on June 7, 1977 and was denied a petition for Writ of Certiorari on

August 26, 1977. The jurisdiction of the United States Supreme Court is invoked on the ground that the validity of a state statute is drawn into question on the ground of its being repugnant to the Constitution of the United States, and on the ground that the Petitioner was otherwise deprived of his rights under the United States Constitution. These aforementioned jurisdictional grounds, together with the fact that a decree rendered by the highest Court of a State (Alabama) is sought to be reviewed, confer upon the United States Supreme Court jurisdiction to grant this petition, pursuant to Title 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

(a) Whether the classification provision in Title 30 Section 97(1), Code of Alabama of 1940 (Recomp. 1958), discrimi-

nates between members of the same class, and between persons similarly situated, by the use of an arbitrary, unreasonable, and capricious population classification so as to deny this Petitioner the constitutional guarantees of equal protection of the law, and to violate the constitutional provisions regarding privileges and immunities, by authorizing an improper question posed by the prosecutor as to whether the jury was to be kept together, thereby jeopardizing the right of Petitioner to allow separation of the jury during trial and ingratiating the prosecution in the minds of the jurors by demonstrating the state's solicitude of their convenience? Since the population classification rendered the statute inapplicable to trials in counties such as Baldwin, where Petitioner was tried, it de-

prived the Petitioner of the statute's protective provisions regarding comments in the jury's presence.

(b) Whether the Alabama Court of Criminal Appeals erred in holding that there was no fatal variance nor denial of due process of law inherent in the conviction of Petitioner under an indictment charging a sale of marijuana to agent William Womack when the Trial Court found a "one joint transaction" sale to both Womack and Deputy Sheriff Roland Howell? In support of its holding, the Court of Appeals stated that the name of the marijuana vendee was not necessary, and furthermore, there was no fatal variance issue raised during the trial.

(c) Whether the case of Duin v. State, 288 Ala. 329, 260 So. 2d 602(1972), should be overruled on the ground that it

provides precedent contrary to the constitutional guarantees of due process of law evidenced by the Fourteenth Amendment and as supported by the United States Supreme Court? Duin v. State supports the following proposition: that where an indictment charges a sale of marijuana to one person and proof is adduced at trial of a sale to two persons of the same contraband under a theory of "one joint transaction", such an indictment is sufficient to support a judgment of conviction.

STATUTES AND REGULATIONS

The statutes, regulations and rules which the case involves are the following:

1. Code of Alabama of 1940, (Recomp. 1958) Title 30, Section 97(1). Separation of jury by consent. The provisions

section shall apply only in the Circuit Court in counties having a population of 140,000 or more according to the last or any subsequent federal census.

If the accused and his counsel and also the prosecuting attorney, in any prosecution for felony, whether capital or non-capital consent thereto in open court, the trial court in its discretion may permit the jury trying the case to separate during the pendency of the trial, whether the jury has retired or not. A separation so permitted shall not create a presumption of prejudice to that accused, but on the contrary it shall be prima facie presumed that the accused was not prejudiced by reason of the separation of the jury.

It shall be improper for the trial court to ask the accused, counsel for the

accused, or the prosecuting attorney in the hearing of the jury whether or not he or they will consent to a separation of the jury pending the trial. It shall be improper for the accused or counsel for the accused, or the prosecuting attorney to state to the trial court in the hearing of the jury that he or they consent to a separation of the jury pending the trial. (1943. p. 358, appvd. July 8, 1943.) This statute now codified as Code of Alabama, 1975, Section 12-16-9.

2. AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS: EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and sub-

ject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the

Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an

executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obli-

gations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

3. 28 U.S.C. § 1257. State Courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c.646,62 Stat. 929.

STATEMENT OF THE CASE

The Petitioner Gabriel Hagendorfer (hereinafter referred to as "Defendant") was charged with sale of a controlled substance by a Baldwin County Court Com-

plaint on the 30th day of August, 1976. He was indicted by the Baldwin County Grand Jury on October 15, 1976, and was arrested on that indictment on October 25, 1976. On October 26, 1976, the Defendant was arraigned on the indictment and pled "not guilty." The Defendant was brought to trial on the indictment, was tried on the indictment and was pronounced guilty of the charge in the indictment on November 8, 1976. On the same date, the Trial Court adjudged the Defendant "guilty" on the verdict and sentenced the Defendant to serve six (6) years in the state penitentiary. The Defendant by his attorney (not Defendant's attorney on appeal), gave oral notice of appeal and entered written notice of appeal. The Alabama Court of Criminal Appeals affirmed the judgment on

May 24, 1977. An application for rehearing was filed on June 7, 1977 and was denied on June 28, 1977. A Petition for Writ of Certiorari was filed with the Supreme Court of Alabama on July 12, 1977 and was denied on August 26, 1977.

The first federal question sought to be reviewed, pertaining to the constitutionality of Code of Alabama, Title 30, Section 97(1) (Recomp. 1958), was raised for the first time in Defendant's brief filed in support of his appeal to the Alabama Court of Criminal Appeals, and again in Defendant's brief filed in support of his Petition for Writ of Certiorari to the Supreme Court of Alabama. The second and third federal questions sought to be reviewed, pertaining to the fatal variance between the indictment and the evidence adduced at trial,

were also raised for the first time by Defendant's brief on appeal to the Alabama Court of Criminal Appeals, and again in his brief filed in support of his Petition for Writ of Certiorari. In all instances above, these federal questions, as raised by the Defendant, were overruled by the aforementioned Appellate Courts' affirmation of the Defendant's conviction and denial of his Petition for Writ of Certiorari.

REASONS FOR GRANTING WRIT

It is the Petitioner's position that all three of the federal questions sought to be reviewed are of a character warranting consideration by the United States Supreme Court, due to the fact that the Alabama Appellate Courts mentioned above decided each in a manner probably not in accord with applicable

decisions of said United States Supreme Court.

ARGUMENT

In support of Petitioner's position and pursuant to U.S. Supreme Court Rule 23(1)(h), Petitioner offers the following argument as amplification of each federal question heretofore raised:

A. Title 30 Section 97(1) As Unconstitutional

A comment by way of question made by the Prosecuting Attorney at the trial (R.39) wherein he said "Are you going to keep them together?", is a remark which can only be prejudicial to the right of the Defendant to allow separation of the jury during trial. The net effect of such a comment is to ingratiate the Prosecution in the minds of the jurors by demonstrating the State's solicitude

of their convenience. It is a comment, the tenor of which, the legislature was attempting to remove in its entirety by the enactment of Act No. 384 of the 1943 Regular Session of the Alabama Legislature, now codified in Code of Alabama of 1940 (Recomp. 1958) in Title 30, Section 97(1), as set forth verbatim in the foregoing Section entitled "Statutes and Regulations".

The intent of the legislature is clear in the Act, i.e. to remove prejudicial effect of separation of jury agreements. It is of little avail to have such a rule, that the trial court cannot ask a defendant if he will consent to a separation and to then let an officer of that court acting for the State to ask such a question. A condonation of such a state of facts would emasculate the end

of the statute's intent in that regard. The Defendant contends that he, as well as all other felony defendants being tried before a jury, have the right to such protection and privilege, and the legislature's error in placing territorial limits on these rights is unconstitutional.

The Defendant contends that Title 30 Section 97(1) violates the law in constitutional magnitude since this Section would deny the Defendant the statutory protection afforded some others in his class from being prejudiced by an improper query from the Prosecutor as to whether the Defendant was going to keep the jury together, which denial is a violation of both the privileges and immunities prohibition and the equal protection clause of the 14th Amendment to the Uni-

ted States Constitution.

The constitutional provisions relating to privileges and immunities are especially significant where classification and class legislation are involved. As applied to legislation obnoxious to the constitution, the terms "classification" or "class legislation" are those which make improper discrimination conferring privileges or immunities on a class arbitrarily from a large number of persons standing in the same relation to the privileges or immunities, without reasonable distinction or substantial difference. Pfeiffer Brewing Company v. Bowles, 146 F 2d 1006. (See, generally 16A C.J.S. Constitutional Law,Section 489 et seq.) Class legislation is invalid where the classification is arbitrary and unreasonable.

The provision of the Fourteenth Amendment to the Constitution of the United States decreeing that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, voids those parts of state statutes which made any unreasonable or arbitrary discrimination between different persons or classes of persons. Under the provisions of the State and Federal constitutions, the same rules are applied as to the validity of classifications made in legislative enactments. Though most legislatures have the power to classify, discrimination is the essence of classification and does violence to the Constitution when the basis of the discrimination is unreasonable. See Harlow v. Ryland, 78 F 784 (D.C.Ark.).

There is no general rule by which to distinguish reasonable and lawful and unreasonable and arbitrary classification, the question being a practical one depending on experience, and varying with the factor of the case. Pacific Gas and Electric Company v. Montgomery, 98 p.2d 819, 37 Cal.App.2d 91. In order to be valid, a statutory classification must reasonably promote some object of welfare or interest, must rely on real and substantial differences, having a natural, reasonable, and substantial relation to the subject of the legislation, and must affect alike all persons or things within a particular class, or similarly situated. City of Alexandria v. Beard, 47 So.2d 553, 217 La.820, affirmed 71 S. Ct. 920, 341 U.S.622, 35 A.L.R.2d 335; Crandon v. Hazlett, 26 So.2d 638,157 Fla.

574. U.S. v. Bendik, 220 F 2d 249 (C.A.N.Y.). (And see generally the cases cited in the footnote to 16A C.J.S. Constitutional Law, Section 489.)

It has been stated above that there must be real and substantial differences upon which to base a population classification. Likewise, it must have a substantial relation to the subject of the legislation. A particular Supreme Court decision summarizes the view of many former decisions and further refines what the criteria are for determining whether a rational basis for classification exists. The U.S. Supreme Court in Eisenstadt v. Baird,405 U.S. 438, 31 L. Ed.2d 349, 92 S.Ct.1029, has said;

"The basic principles governing application of the Equal Protection Clause of the Fourteenth Amendment are familiar. As The Chief Justice only recently explained in Reed v Reed, 404 US 71, 75-76,

30 L Ed 2d 225, 229, 92 S.Ct.251 (1971).

'In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. Barbier v. Connolly, 113 US 27[28L Ed 923, 5 S.Ct. 3571] (1885); Lindsley v. Natural Carbonic Gas Co. 220 US 61 [55 L Ed 369, 31 S.Ct.3371(1911); Railway Express Agency v.New York, 336 US 106 [93 L Ed 533, 69 S.Ct.463](1949); McDonald v.Board of Election Commissioners, 394 US 802[22 L Ed 2d 739, 89 S.Ct.1404] (1969). The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. v. Virginia, 364 US 412, 415 [64 L Ed 989, 990, 40 S.Ct.560] (1920)."

It has been said that where legislation is classified as to localities as it is in this law herein being considered, that the law must apply to all persons who

are similarly situated in such localities and to all parts of the state where like conditions exist. (Emphasis added). Badenoch v. Chicago, 78 N.E.31,222 Ill,71; People v. Marcello, 25 N.Y.S.2d 533;Malone v.Williams,118 Tenn.390. And a classification of cities or other territorial subdivisions according to population is invalid if it is arbitrary, unreasonable or unjust.

The constitutional prohibition against class legislation does not deprive the legislature of all discrimination in defining the class to which an act would apply, but when the classification attempted is clearly arbitrary, unreasonable, and unjust the court will review its discretion. Smith v. Wolf, 49 So. 395 160 Ala. 644. Classification by statute must not be arbitrary, must not

be arbitrary, must not be a subterfuge to shield one class and duly burden another, and must not unduly oppress in its administration. Al Means, Inc. v. City of Montgomery, 114 So. 2d 816, 268 Ala.31. It is essential that legislative classification be reasonable and not arbitrary, and that it not be based on material and substantial distinctions and differences reasonably related to the subject matter in the legislation and that there be uniformity within the class. Al Means, Inc. v. City of Montgomery, supra.

Any state action which discriminates against segments of its population is subject to "strict scrutiny". The state must demonstrate not merely a reasonable justification for the distinction it draws between citizens, it must show a compelling state interest. Thomas v.Mims,

317 F. Supp.179(D.C.Ala.1970).

A statute which is designed and intended to remove the possibility of favoritism or prejudice for or against the State or a defendant in a criminal case which may occur by "locking up a jury" can have no territorial limitations based on population if criminal juries are trying cases in any other jurisdiction in the State. The end to be accomplished by the Statute bears no relation to population but only relates in fact to the question of whether or not juries are trying a defendant in a felony criminal case.

A similar argument applies to equal protection where there is class legislation.

Equal protection to all is the basic principal on which rests justice under

the law, Pierre v.State of La. S.Ct.536, 306 U.S.354,83 L.Ed.757. By virtue of a clause in the 14th Amendment ot the Constitution of the United States expressly forbidding it to do so, a state may not deny to any person within its jurisdiction the equal protection of the laws. This clause is a promise of equal protection of the laws, and it means, and is a guarantee, that all persons subject to state legislation shall be treated alike under like circumstances and conditions, both in privileges conferred and in liabilities imposed; the guarantee is to the protection enjoyed by other persons or classes in the same position and under like curcumstances, in pursuit of a lawful occupation. (See generally 16A C.J.S.. Constitutional Law, Sections 501 et seq.).

It is intended to secure and safeguard equality of right and of treatment against arbitrary discrimination. And while it operates only on legal rights otherwise created or existing and does not itself create any new legal rights, it is the general right to equal protection of the laws. Shelly v.Kraemer, 68 S.Ct.836,334 U.S.1,92 L.Ed 1161,3 A.L.R. 2d 441.

The constitutional right of equal protection of the law means that everyone is entitled to stand before the law on equal terms with, to enjoy the same rights as belong to, and to bear the same burdens as are imposed on, others in a like situation. State v.Guirlando, 93 So.796, 152 La.570.

State and Municipal legislation is subject to the constitutional requirement

that no state may deny the equal protection of the laws to any person within its protection. Shelly v.Kraemer, supra. And it is valid as complying with, or invalid as violating, the requirement of equal protection as it does or does not, within the sphere of its operation, execute and treat alike with equality and uniformity, and without arbitrariness or unreasonableness or discrimination, all persons similarly situated. Goessart v. Cleary, 69 S.Ct.198,335 U.S.464,93L.Ed. 163; Shelly v.Kraemer supra. Messer v. Southern Airways Sales Co., 717 So.2d 679, 245 Ala.462.

The Prohibition against denia of equal protection does not preclude a State or Municipality from resorting to classification for purposes of legislation and confining the legislation to a cer-

tain class, Goessar v. Cleary, supra.; provided the classification or discrimination is reasonable rather than arbitrary and where it rests on a real and substantial difference or distinction which bears a just and reasonable relation to the legislation or the subject or object thereof. People v.Saltis, 160 N.E. 86,328 Ill,494, Loftin v.Crowley's, Inc., 8 So. 2d 909, 150 Fla.836; and provided also the legislation operates equally, uniformally and impartially on all persons within the same class. Barge v.Camp, 70 S.E.2d 360,209 Ga 38.

While legislation may confine its operation to areas having a designated population, including municipalities, that is, divided into classes based on population, the classification must be a natural one, bearing a reasonable rela-

tionship to the subject legislation, and not be arbitrary or capricious, as is the case with the statute under consideration Goessart v. Cleary,supra; Grigsby v.King, 260 P.789,202 Cal.299;Harbert v.Mabry, 51 S.W.2d 652,166 Tenn.290.

B. Fatal Variance

Although the fatal variance issue was not raised at trial, this matter is of such a nature as to clearly call it a matter that palpably prejudices the Petitioner's right to due process under the Fourteenth Amendment. Furthermore, the sufficiency of the indictment was clearly brought to the trial court's attention as appears in the Record at pages 36-39, at which point the County's Complaint (found at page 150 of Record) was introduced into evidence.

The indictment in this cause reads as follows:

"The Grand Jury of said County charge that before finding this indictment on, to-wit: June 12, 1976, Gabriel Hagendorfer did unlawfully sell to William Womack marihuana, one of the controlled substances enumerated in Title 22, Section 258 (29)(d), as set out in the Alabama Uniform Controlled Substances Act, against the peace and dignity of the State of Alabama." (Emphasis supplied)

The testimony adduced at trial shows in each case that Deputy Roland Howell was in truth and in fact the actual vendee, not Agent William Womack, as follows:

1. Appearing in the Record on page 35 in the testimony of William Womack to-wit:

"Q Tell me this: What denomina-

tions did Mr. Howell pay this man in?

A Denominations of money?

Q Yes. Do you know?

A I believe he gave him two twenties ($20.00) and a five ($5.00)."

2. Appearing in the Record on page 44 in the testimony of Roland Howell, to-wit:

"Q And did you pay him for the grass that you received?

A Yes, sir. Paid him forty-five dollars ($45.00).

Q Do you know what denominations the bills were?

A It seems like it was two twenties ($20.00) and a five ($5.00). I'm not absolutely sure, but I feel like that is what it was."

3. Appearing in the Record on page

47 in the testimony of Roland Howell, to-wit:

"Q When you bought this material from him, you were acting in your capacity as a law enforcement officer for Baldwin County and the State of Alabama, is that correct?

A Yes, sir.

Q The money that you used to make this buy was furnished by whom?

A By the Sheriff.

MR. COOPER:

Who?

A By the Sheriff.

MR. HENDRICKS:

Q By the Baldwin County Sheriff's Department?

A Yes, sir."

4. Appearing in the Record on page 59 in the testimony of Roland Howell, to-

wit:

"Q Who gave the money-Who passed the money to the Defendant here?

A I did.

Q And what denominations was it?

A The best I remember, it was two twenties ($20.00) and a five ($5.00).

Q And you got three packages for that, is that correct?

A Yes, sir."

5. County Court Complaint attached as Defendant's Exhibit #1 to the record as an unnumbered page 150 and referred to and admitted in evidence (R.39).

It is apparent from the testimony above set out that the Defendant sold the marijuana to Deputy Roland Howell for $45.00, money which Howell obtained for that purpose from the Sheriff of Baldwin County, not the Alabama Beverage Control

Board by way of its narcotics agent William Womack.

There was no sale from Womack to the Defendant, but the evidence shows a sale from the Defendant to Roland Howell in as much as the "transaction" fails to meet, in the former case, and does meet, in the latter case, the requisites for a sale as defined in Butler v.Thomson 92 U.S.414 (1875), wherein it states "Blackstone's definition as '(a) transmutation of property from one man to another in consideration of some price." The sale here was from Defendant to Roland Howell of marihuana in consideration of a price of $45.00.

The proof, therefore, is at absolute variance with the charge in the indictment wherein a sale to William Womack is charged.

There is no proposition of law more

fundamental than the one which requires that the proof at trial must correspond with the material allegations of the indictment. State v. Plunket, 2 Stew.11 (1829); Stone v. State,115 Ala.121,22 So. 275(1896); Owens v.State, 46 Ala.App.591, 246 So.2d 478(1971).

It is generally considered that where it is necessary in an indictment to state the name of a third person as a part of the description of the offense, that the name must be correctly stated in substance and a material variance is fatal. 42 C.J.S. Indictments and Informations Sec. 265. Wheaton v.State,29 Ala. App.231,194 So. 712 (1940).

The Court of Appeals speaking in the case of Parks v.State, 21 Ala.App.177, 106 So.218(1925) discussed a case wherein

an indictment charged the defendant with robbery of "Wesley Dukes" and testimony elicited the fact that one "J.W. Dukes" was robbed to which the Court stated:

> "As stated, the name of the person alleged to have been assailed, as laid in the indictment is "Wesley" Duke. This is a material averment and element of proof resting upon the state as to the identity of the offense. Morningstar v.State,52 Ala. 405; Nugent v.State, 19 Ala.540; McCaig v.State, 16 Ala.App.581,80 So. 155. It being a material averment and an essential ingredient of the offense, it was incumbent upon the state to adduce proof to sustain it (Shoults v. State, 19 Ala.App.19,94 So.777), and this was not done."

The Court went on further to say:

"This question involves a substantive right of defense; therefore the defendant was under no duty, when requesting the affirmative charge, to bring this failure of proof of this material and essential averment to the attention of the court before the conclusion of the argument of counsel." Thompson v. State, 48 Ala.165, 171. In the case of Morningstar v. State, supra, Chief Justice Brickell, for the court, said:

> "When an injury to the person or property of another is the offense charged, a material averment of the indictment is the identity of such person. If the name of such person is stated, a variance between the allegation and proof as to such name

> name is fatal.'
>
> 'The allegation and proof must correspond.
>
> Stone v. State, 115 Ala.121,22 So. 275."

The authorities are clear to the propositions stated above and to which Judge De Graffenreid succinctly stated the duty of the State in Garner v.State, 3 Ala.App.161,57 So.502(1912):

> "No proposition is more familiar than a man cannot be indicted for an offense, and under that indictment suffer a conviction of an offense not named in the indictment. A man cannot be indicted for the larceny of a horse, and under that indictment be convicted of the larceny of a mule." (Emphasis supplied.)

C. Duin v. State Should Be Overruled.

The present case is surely an example of the dangers which can occur in allowing indictments to be inspecific, thereby depriving the criminal defendant of due process of law. Consequently, Duin v. State, 288 Ala.329,260 So.2d 602 (1972), should be overruled by this Honorable Court. Cases such as Duin v. State are a mandate for inspecific indictments, a practice which this Court surely cannot condone.

In this particular case, as discussed above, the indictment names only William Womack as vendee in the marihuana sale, but the evidence adduced at trial goes to show "one-joint transaction" with both William Womack and Roland Howell

as the vendee.

As a result of said variance between the indictment and the evidence adduced at trial, which is authorized by the Duin precedent, the testimony of Petitioner (R.110) would be a confession to a sale of marihuana to Roland Howell in a Florida prosecution, if taken together with the testimony of Mary Frank, the Petitioner's witness (R.89). There exists no protection for Petitioner's rights of due process (i.e.-privilege against double jeopardy) by this mode of Alabama indictment. In essence, the Petitioner is subject to being prosecuted in Florida for a sale to both officers, Womack and Howell, even though he has already been convicted in Alabama on the "one joint transaction" theory. Such a state of affairs is patently unjust, and should

be remedied by overruling the dangerous precedent of Duin v. State.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

J. Michael Druhan, Jr.
Attorney for Petitioner,
Gabriel Hagendorfer

CERTIFICATE OF SERVICE

I certify that three copies of the foregoing petition have been served on Respondent, the Honorable William J. Baxley, Attorney General of the State of Alabama, on the 22nd day of November, 1977, by United States Mail, postage prepaid, and properly addressed.

J. Michael Druhan, Jr.

APPENDIX

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May 24, 1977

THE STATE OF ALABAMA-JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM 1976-77

1 Div. 784

Gabriel Hagendorfer

v

State

Appeal from Baldwin Circuit Court

TYSON, PRESIDING JUDGE

Gabriel Hagendorfer was charged by the indictment with unlawfully selling marihuana to William Womack, on June 12, 1976, contrary to the provisions of the Alabama Uniform Substances Act.[1, 2]

---

1. Title 22, Section 258(29)(d), Code of Alabama 1940, as amended 1971.

2. Appellate counsel did not represent the appellant on trial of this cause.

The jury's verdict found the appellant guilty as charged, and the trial court entered judgment which set sentence at six years imprisonment in the penitentiary.

The appellant asserts four contentions on appeal which arise from the following testimonies at trial conducted November 8, 1976, in the Circuit Court of Baldwin County.

William H. Womack, a State Narcotic Agent with the ABC Board, and Roland Wayne Howell, a Deputy Sheriff with the Baldwin County Sheriff's Department, testified that they were together on the evening of June 12, 1976, when they first encountered the appellant, Gabriel Hagendorfer, near the baseball park in Pensacola, Florida. They had driven to this location from near Elberta in Baldwin

County in the company of the appellant's brother, Billy Hagendorfer, and a girl named Mary Frank. Subsequently the officers followed the appellant back across the "Lillian Bridge" along U.S.Highway 98 until it intersected with County Road 87, just east of Elberta where the appellant turned off. The appellant was driving a Chevrolet Camero, and the two officers were following in an unmarked automobile. The appellant pulled up a couple of a hundred yards, stopped, and the two officers pulled up beside him. The appellant advised them, "It's right here," and proceeded to fill three plastic sandwich bags, commonly called "baggies," and the two officers paid him $45.00, two twenties, and a five dollar bill. He then handed the three bags of marihuana to the

Officers. This transaction took place between five and ten minutes, and occurred between 10:00 and 10:30 o'clock on the evening of June 12, 1976 (R.pp.20-21).

The two officers shortly thereafter delivered the three plastic bags to Deputy Gene Kinsey, who placed them in a manila envelope and marked the envelope with his initials, then delivered this envelope to Chief Deputy Sheriff James W. Anderson, Jr.

The following morning, June 13, 1976, Deputy Larry Linder received the manila envelope from Chief Deputy Anderson about 9:00 a.m., and after examining it and finding that it contained three plastic bags of marihuana, he initialed the envelope and delivered it to State Toxicolo-

gist James L. Small at the Mobile office.

Mr. Small testified that he performed two scientific tests on the contents of the three plastic bags in addition to examining the substance through a microscope. Mr. Small testified that the total weight of the green plant material was 61.2 grams, and that it was marihuana.

The appellant presented the testimony of Mary Frank and his brother, Billy Hagendorfer, in addition to his own testimony, which did not vary from the testimonies of Officers Womack and Howell, except that the defendant's witnesses contended that the sale of the marihuana to Officers Womack and Howell took place in Florida before they crossed the Lillian Bridge into Baldwin County.

I

The appellant first contends that

the State failed to prove a prima facie case in that the alleged marihuana was never admitted into evidence.

We have carefully examined this record and determined that the substance was marked for identification on motion of the District Attorney, Mr. Hendricks, as State's Exhibit 2, and was exhibited to the jurors with the statement from Mr. Hendricks, "We want to introduce these three packages, these three things in evidence here, and you can combine them." No objections were interposed by the appellant, nor was there an issue made at trial to this offer of this proof.

We are of the opinion that the State here established through the testimony of the several officers a prima facie case, and that venue of the offense was also

properly established. Hill v. State, 56 Ala. App. 369, 321 So.2d 708, cert. denied 295 Ala.___,(sic.), 321 So. 2d 713.

Moreover, the State Toxicologist, Mr. Small, and three of the officers identified the substance in question as marihuana. This was without objection or exception. We, therefore, are of the opinion that the appellant's argument is not well taken. Gamble v. State, 48 Ala. App. 605, 266 So. 2d 817; Simpson v.State, 51 Ala. App. 279, 284 So. 2d 734; Hill v. State, supra; Means v. State, 51 Ala. App. 8, 282 So. 2d 356, cert.denied 291 Ala. 792, 282 So. 2d 359, and authorities therein cited.

Moreover, the appellant's own witnesses at trial identified the substance as marihuana. Thus, no error is shown.

II

The appellant also contends that there was a fatal variance between the indictment and proof on trial since the evidence established a sale to Deputy Sheriff Roland Howell "when the indictment charged the unlawful sale of marihuana to William Womack."

At the outset, we note there was no demurrer imposed to the indictment, nor was the sufficiency of this indictment raised at trial. Where, as here, the indictment follows substantially the language of the statute, but simply fails to set out the name of the vendee, such was nevertheless sufficient to support a judgment of conviction. Duin v. State, 288 Ala. 329, 260 So. 2d 602, and authorities cited therein.

In the case at bar, however, the indictment simply averred the name of Agent Womack when the proof on trial affirmatively establishes that both officers participated in the purchase from the appellant, and each was handed at least one plastic bag of marihuana at the time of the alleged sale (R.pp.20-22, and R. pp.41-48.)

We are of the opinion that this was one joint transaction, and the evidence was properly admitted as to the sale to the officers, Womack and Howell. Morrow v. State, 52 Ala. App. 145, 290 So.2d 209, cert. denied 292 Ala. 743, 290 So.2d 213, and authorities therein cited.

III

The appellant asserts that there was a prejudicial comment in the presence of

the jury by the district attorney just before the noon recess, wherein the following occurred (R.pp.39-40):

> "THE COURT: All right. Ladies and Gentlemen, we are going to recess for lunch. Let me caution you not to discuss this case with anyone, not even among yourselves. Do not allow anyone to discuss it in your presence. If they do, tell them you are on this Jury, and if they persist in discussing it with you or in your presence, please report that back to the Court. Let me caution you not to discuss this case with anyone.
>
> "MR. HENDRICKS: Are you going to keep them together?
>
> "THE COURT: No, sir. I have already discussed that with both of them. All right, Ladies and Gentlemen, you are excused. Let's try to get back here by 1:15.
>
> "(WHEREUPON, A RECESS WAS HELD,AFTER WHICH THE FOLLOWING OCCURRED:)

This argument, however, overlooks the agreement between the attorneys that the jurors could separate (R.pp.3-4), and

in addition, there was not objection or other motion with reference to the comment of the district attorney above shown. Therefore, no ruling of the trial court was invoked. In brief, the appellant seeks to assert the invalidity of Title 30, Section 97, Code of Alabama 1940, as being violative of the Fourteenth Amendment to the Constitution of the United States (Appellant's brief, page 9).

In Weathington v. City of Birmingham, 52 Ala. App. 77, 289 So. 2d 645, writ den. 292 Ala. 757, 289 So. 2d 649, we find the following discussion:

> "Further, to warrant a court in decreeing a statute void, its invalidity must be distinctly pointed out. Cooper v. Hawkins, 234 Ala.636,176 So.329.
>
> "Here, the alleged unconstitutionality of this act was not raised in the trial court. As stated in Williams v.City of Birmingham, 41 Ala.

App.208, 244 So.2d 713,cert.denied 272 Ala.671,133 So.2d 718, 'We are not at liberty to consider a a question which was not raised below.'

"There is no evidence or pleading pertaining to this issue in the record. Therefore, there is nothing for this Court to review on this alleged error. Williams v.State, 291 Ala. 505, 282 So. 2d 905."

Moreover, the argument here asserted by the appellant has been expressly rejected by the Supreme Court of Alabama in Young v. State, 283 Ala. 676, 220 So.2d 843.

IV

Finally, the appellant asserts that he was improperly impeached at trial with reference an alleged conversation which took place three or four days after the alleged sale in question between the appellant and the two officers at Wolf Bay Lodge. On Record page 114, during cross-

examination, we find the following colloquy:

"Q. Did you see either or both of these officers two or three days after this night that we are talking about?

"A. Yes,sir.

"Q. Where?

"A. At a place called Wolf Bay Lodge. It was a week to the day.

"Q. Did you talk to them?

"A. They talked to me.

"Q. They talked to you?

"A. Yes. They wanted to buy some more.

"Q. Did you tell one of these officers on that occasion, or both of them, that you were so bummed out of your mind on the night that you made the sale to them that you didn't even know how much you let them have or what they paid you?

"A. No, sir.

"Q. You didn't say that to these officers?

"A. No, sir.

"MR. HENDRICKS: That's all."

In rebuttal, both Officers Womack and Howell were called to the stand and were asked if in fact the appellant had made a statement in effect that "he was so bummed out of his mind that he did not remember," and each officer answered in the affirmative (Deputy Howell, R.pp. 116-117; and Agent Womack, R.pp.121-122).

We are of the opinion that the trial court was careful here to see that a proper predicate was laid for this impeachment testimony; and that in the first instance where the district attorney referred to Wolf Bay Lodge as Gulf Gate Lodge, such was corrected during the testimony of the two officers so that there was no question as to the place

where such statement was made, and moreover, that the time and essence of the statement were sufficiently called to the appellant's attention during the cross-examination shown above. We are of the opinion that this statement, being in effect an admission against interest, was properly admitted by the trial court. Blackwell v. State, 264 Ala.553, 88 So. 2d 347, and authorities therein cited.

We have carefully examined this record and find same free from error. The judgment is therefore

AFFIRMED.

All the Judges concur.

Court of Criminal Appeals
State of Alabama
P. O. Box 351
Montgomery 36101

John C. Tyson III
John O. Harris
John P. DeCarlo
John G. Bookout
William M. Bowen, Jr.
Judges

Mollie Jordan
Clerk

June 28, 1977

RE: Gabriel Hagendorfer v. State
1st Div. 784
Baldwin Circuit Court # 7327

The following decision has been handed down in the above-styled cause:

"June 28, 1977. Opinion corrected, application for rehearing overruled. All the Judges concur."

Please replace the front page of the opinion issued May 24, 1977, by the Court of Criminal appeals with the attached corrected page.

Mailing Address:
P. O. Box 157
Montgomery, Alabama 36101

Telephone: 832-6480

Office of
Clerk of the Supreme Court
State of Alabama
Montgomery

Re: SC 2710
EX PARTE: GABRIEL HAGENDORFER
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(RE: GABRIEL HAGENDORFER ..... vs.
Appellant
STATE OF ALABAMA) .....
Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

___ Appeal docketed. Future correspondence should refer to the above SC number.

___ Court Reporter granted additional time to file reporter's transcript to and including

___ Clerk/Register granted additional time to file clerk's record/record on appeal to and including

___ Appell___ granted 7 additional days file briefs to and including

___ Appellant(s) granted 7 additional days to file reply briefs to and in-

cluding

___ Record on Appeal filed

___ Appendix Filed

___ Submitted on Briefs

XXX Petition for Writ of Certiorari denied. No opinion.

___ Application for rehearing overruled. No opinion written on rehearing.

___ Permission to file amicus curiae briefs granted

___

August 26, 1977

s/J. O. Sentell
Clerk, Supreme
Court of Alabama

Supreme Court, U. S.
FILED
DEC 27 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-751

GABRIEL HAGENDORFER,

PETITIONER

VS.

STATE OF ALABAMA,

RESPONDENT

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM J. BAXLEY
ATTORNEY GENERAL OF ALABAMA

WALTER TURNER
CHIEF ASSISTANT ATTORNEY
GENERAL OF ALABAMA

LINDA C. BRELAND
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

GABRIEL HAGENDORFER,

PETITIONER,

VS.

STATE OF ALABAMA,

RESPONDENT,

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The only written opinion rendered in this case was by the Alabama Court of Criminal Appeals, said opinion being reported in _____ Ala. _____, 348 So. 2d 1097 (1977).

Petition for Writ of Certiorari to the Alabama Supreme Court was denied without an opinion, said order being reported in _____ Ala. _____, 348 So. 2d 1101 (1977).

JURISDICTION

Petitioner applies for this Writ of Certiorari pursuant to the provisions of 28 U.S.C. §1257 (3).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Respondent adopts as substantially true and correct the Statement of the Case contained in Petitioner's Writ of Certiorari.

QUESTIONS PRESENTED

1. Does the Supreme Court of the United States have jurisdiction to review the constitutionality of a state statute (a) when the Petitioner failed to comply with state procedural law by raising this issue in the trial court, and (b) where the statute was followed at the Petitioner's trial, so that the Petitioner was in no way harmed by the operation of the statute?

2. Is a variance so material as to violate due process of law where the indictment names one vendee in a single sale of marjuana and the proof at trial shows that there were two vendees, and where the Petitioner was not misled by the indictment?

3. Does the Petitioner have standing to challenge the constitutionality of a state court decision where there is no case or controversy presented thereunder?

REASONS FOR DENYING THE WRIT

I. THE PETITIONER IS NOT ENTITLED TO CHALLENGE THE CONSTITUTIONALITY OF TITLE 30, SECTION 97(1), CODE OF ALABAMA 1940, BECAUSE THE STATUTE WAS FOLLOWED AT TRIAL.

The Petitioner claims that he was denied equal protection and due process of the law because he was deprived at trial of the protections of Title 30, Section 97(1), while persons in counties of greater than 140,000 population received these protections. This argument fails because the statute was followed in the Petitioner's trial. Even if the statute had applied in the county where he was convicted, the Petitioner would not have received any additional benefits thereunder because the terms of the statute were not violated at his trial.

Title 30, Section 97(1) reads, in part:

> "It shall be improper for the trial court to ask the accused, counsel for the accused, or the prosecuting attorney in the hearing of the jury whether or not he or they will consent to a separation of the jury pending the trial. It shall be improper for the accused or counsel for the accused, or the prosecuting attorney to state to the trial court in the hearing of the jury that he or they consent to a separation of the jury pending the trial.

The statute only requires (1) that the judge not ask, within the hearing of the jury, whether either of the par-

ties will consent to a separation, and (2) that neither the defendant nor the prosecuting attorney state, within the hearing of the jury, that he will consent to a separation. The purpose and intent of this provision, as construed by the Alabama Supreme Court, is twofold: (1) to prevent a defendant from being prejudiced by the jurys' knowledge that he has refused to consent to their separation and (2) to prevent the jury from showing undue favoritism to a defendant by reason of knowledge that he has consented to their separation. *Kennedy v. State*, 291 Ala. 62, 277 So.2d 878 (1973).

The requirements of the statute were met in the instant case. Neither of the parties either consented or refused to consent to a separation in the presence of the jury. There was nothing said which would have prejudiced the jury against the defendant. The prosecuting attorney merely asked the trial judge, "Are you going to keep them together?," as the jury recessed for lunch, to which the judge replied, "No, sir. I have already discussed that with both of them. . . ." Certainly, if this exchange had had any effect on the jurors, the effect would have been favorable toward the Petitioner because he consented to the separation. In fact, it might seem as though the prosecutor suggested that the jury be kept together but the defendant permitted them to separate for lunch.

In any event, there was no indication in the record, nor was there any showing on appeal, that the jury even heard or understood this exchange. The statute explicitly requires that the statement be made in the hearing of the jury in order for impropriety to result. The Supreme Court of Alabama acknowledged this requirement in *Kennedy v. State*, 291 Ala. 62, 277 So.2d 878 (1932), where a defendant claimed that Title 30, Section 97(1) had been violated because he

signed a separation agreement in the presence of the jury. The Court rejected this argument, stating:

> "We have searched the record carefully and can find no evidence that the jury *heard* anything to indicate whether the defendant agreed or refused to agree to their separation."

This case indicates that the burden is on the defendant to prove that the jurors heard the statement and were prejudiced thereby. There has been no showing by the Petitioner in this case that the jury members heard the prosecutor's question or that they were in any manner prejudiced by it.

II.

THE PETITIONER WAIVED ANY POSSIBILE RIGHT TO CHALLENGE THE CONSTITUTIONALITY OF TITLE 30, SECTION 97(1) BY HIS FAILURE TO OBJECT AT TRIAL TO ALLEGED VIOLATIONS OF THE STATUTE.

The Alabama Court of Criminal Appeals, in dealing with the Petitioner's contention that Title 30, Section 97(1), Code of Alabama 1940, violates the Fourteenth Amendment to the Constitution of the United States, found that it could not consider this question because it was not raised in the trial court. Specifically, the Petitioner did not make any objection when the prosecuting attorney asked the trial judge, "Are you going to keep them [the jury] together?", nor did the petitioner file any motion with regard to the above-comment. Thus, the Court of Criminal Appeals had nothing to review.

The Court never reached the issue of whether this statement was a violation of Title 30, Section 97(1), or of whether the protections of that statute would be extended to the Petitioner, but found that the Petitioner waived his right to assert the alleged unconstitutionality on appeal because he failed to object to the statement at trial.

This result is in keeping with other Alabama cases which follow the rule that, generally, improper conduct on the part of a prosecutor is not subject to review unless there is a prompt, specific and appropriate objection by the opposing counsel and a ruling by the trial court on the objection. *Heard v. State,* 335 So.2d 679 (1976); *Anderson v. State,* 209 Ala. 36, 95 So. 171 (1923); *Espey v. State,* 270 Ala. 669, 120 So.2d 904 (1960).

The Court of Criminal Appeals had an adequate and independent procedural ground upon which to base its decision without ever reaching the question of the constitutionality of the statute. The Court did note that the Supreme Court of Alabama had upheld the constitutionality of the statute in *Young v. State,* 283 Ala. 682, 220 So.2d 848 (1969) but the Court did not base its ruling on that ground in the instant case.

Because the state appellate court ruled on an independent procedural ground rather than on the constitutional issue, this Honorable Court should decline to review the case. In the 1965 case of *Henry v. Mississippi,* 379 U.S. 443, 13 L.Ed.2d 408, 85 S.Ct. 564, reh. den. 380 U.S. 926, 13 L.Ed.2d 813, 85 S.Ct. 878 (1965), the United States Supreme Court held that it would decline to review state court judgments which rest on independent and adequate state substantive or procedural grounds, even where those judgments also decide

federal questions. The Court qualified this principle by adding that a litigant's procedural defaults in state proceedings would not prevent the Court from reviewing the case where the State's insistence on compliance with its procedural rule did not serve a legitimate state interest.

In the instant case, the State of Alabama clearly has a legitimate interest in requiring that the defendant in a criminal trial make the judge aware of his contention that a statement made by the prosecutor was prejudicial, either by timely objection or by a motion for mistrial or new trial. Otherwise, the trial judge has no opportunity to determine whether an error has occurred or to attempt to correct the error if one has been made.

In an Alabama case with facts similar to the case at bar, *Kenny v. State,* 51 Ala. App. 35, 282 So.2d 387 (1973), where the prosecuting attorney asked the trial judge in the presence of the jury, "Have we had some stipulation on separation?", the Alabama Court of Criminal Appeals affirmed the case stating:

> "We think that the failure of defense counsel to object or ask for a mistrial precludes our finding error in the Assistant District Attorney's using the word "separation" in the presence of the jury."
>
> ". . . Since the point was neither reserved by objection before the jury went to lunch nor by way of a ground in a motion for new trial, the State was given no opportunity in the trial court to exonerate itself from the pall cast by the separation."

Here, the Petitioner gave the trial judge no opportunity to rule on his objection or to determine whether the jury

had heard or had been prejudiced by the prosecutor's question. In light of his failure to properly raise his objection at trial, he should now be precluded from raising the objection on appeal to the United States Supreme Court.

III.

THE STATUTE IN QUESTION IS CONSTITUTIONAL.

For reasons already stated, this Honorable Court has sufficient grounds for denying certiorary without reaching the issue of whether Title 30, Section 97(1) is constitutional. However, should the Court consider this issue, it must reach the conclusion that the statute is valid.

The Petitioner contends that he, as well as all other felony defendants being tried before a jury, have the right to the protections provided in Title 30, Section 97(1), and that the placing of territorial limits on these rights by the Alabama Legislature is unconstitutional. Such is not the case. There is no constitutional guarantee that a defendant not be asked in the presence of the jury whether he consents to a separation. Prior to the passage of Title 30, Section 97(1), no criminal defendant was entitled to this benefit. This was simply a privilege bestowed by the Alabama Legislature within the limits it saw fit to set.

The Supreme Court of Alabama upheld the validity of Title 30, Section 97(1) in *Young v. State*, 283 Ala. 676, 220 So.2d 843 (1969), observing that the claim of discrimination based on population under this statute was not analogous to the reapportionment cases of *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663, and *Reynolds v .Sims*, 337 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506, because in those cases

an important constitutional right, the right to vote, was involved. Here, the Court continued, no such constitutional right was in question, therefore the same standards did not apply. As the Court stated:

> That a presumptive, procedural right (presumption in favor of defendant that prejudice ensued where jury was allowed to separate during trial of case) not guaranteed by state or federal constitution, where granted to some, if not most, defendants in criminal cases, must be granted to all defendants similarly situated, or it is unconstitutional, is simply not the law. The legislature has plenary power, to pass any law on any subject it so desires except as restricted by the constitutional state or federal, Ex parte Foshee, 246 Ala. 604, 21 So.2d 827; Sec. 44, Constitution of Alabama 1901, and, when it deems necessary, can limit the application of a law to one or more political subdivisions within the state, and base such limited application upon any reasonable factor, such as population, it wishes, and unless there is a clear showing that the intended limited application is arbitrary, unreasonable and not made in good faith, it is good law and must be followed. Reynolds v. Collier, 204 Ala. 38, 85 So. 465; Thomas v. Fesguson, 267 Ala. 383, 102 So.2d 20.

The *Young* case, dealt with the first part of the statute, which provides that if the defendant and the prosecuting attorney both consent, in open court, to the separation of the jury, there shall be a presumption that the jury is not prejudiced by the separation. Because this section of the statute specifically calls for the consent to be made in open court in counties of greater than 140,000 population, the

Legislature obviously felt that it was necessary to add certain guidelines to be followed when obtaining the consent in those counties. These are reasonable guidelines which relate particularly to the first part of the statute and are therefore constitutionally valid.

Subsequent to the Alabama Supreme Court's decision in the *Young case*, supra, the same defendant, Cleophus Young, filed a habeas corpus petition in federal district court, again alleging the unconstitutionality of Title 30, Section 97(1). The petition was denied and he then appealed to the Fifth Circuit Court of Appeals. The Fifth Circuit affirmed the denial of the petition, stating that jury sequestration is not a fundamental or constitutionally guaranteed right, and, therefore, that in order to satisfy the requirements of the equal protection clause the state was required to show only that the distinction was reasonable and free from invidious discrimination. *Young v. State of Alabama*, 443 F.2d 854 (5th Cir. 1971). The Fifth Circuit found that the State of Alabama met this burden. Young then appealed to the United States Supreme Court, where certiorari was denied. *Cleophus Young v. Alabama*, 405 U.S. 976, 31 L.Ed.2d 251 92 S.Ct. 1202, (Mar. 6, 1972).

As in *Young*, supra, certiorari should again be denied because (1) the Petitioner waived any right to challenge its constitutionality by failing to comply with Alabama procedural law and raise this issue in the trial court, (2) the record clearly shows that the statute was followed and that the Petitioner was not harmed because the statute did not apply in his county, and (3) the Petitioner has failed to show that the statute is arbitrary, unreasonable, or not passed in good faith.

Finally, even assuming that this Honorable Court did

grant certiorari and did find that the statute was unconstitutional, such a finding would in no way benefit the Petitioner. The effect of such a ruling would be to invalidate the entire statute at the time of the Petitioner's trial and he would still not be eligible to receive any of the protections afforded by the statute.

It should be noted that in the new Code of Alabama 1975, which became effective on October 31, 1977, the distinction based on 140,000 population was deleted from Title 30, Section 97(1), so that the statute now applies in every county in Alabama. See *Code of Alabama 1975*, §12-16-9.. (Attached as Appendix A)

IV.

THERE WAS NO MATERIAL VARIANCE BETWEEN THE INDICTMENT AND THE PROOF AT TRIAL.

The Petitioner claims that he was denied due process of law in that there was a fatal variance between the indictment under which he was convicted and the proof at trial. The Petitioner claims that, while the indictment charged him with selling marijuana to one "William Womack," the proof at trial showed the actual vendee to be Deputy Roland Howell. This claim is totally without merit. The record reflects that the sale was made to both William Womack and Roland Howell. These two agents were working together as a team and they both participated in the buy. The evidence clearly shows that the Petitioner made the sale to both Womack and Howell in a single transaction: Agent Womack gave the following account of the transaction:

"A. Well, we both, Agent Howell and myself, got

out of the car and walked up to the driver's window. And he told us he had the stuff right there in the car, and asked how much we wanted. And we told him we would take three bags. And he took a plastic sandwich bag, commonly called a baggie, and filled up three bags out of a larger bag he had in the car.

"Q. And he delivered it to you at that time?

"A. Yes, sir." (R. 20)

On cross-examination, Agent Womack was questioned as follows:

"Q. Now, I want to ask you again for clarity: if I understood you correctly, you are telling this Jury that this Defendant sold the controlled substance to Mr. Howell, is that correct?

"A. Well, he actually sold it to both of us. Mr. Howell got two of the bags and I got one of the bags.

"Q. Did he hand you a bag and Howell two bags?

"A. Yes, sir." (R. 35)

Even the testimony of Gabriel Hagendorfer, by itself, would be sufficient to prove that he had sold marijuana to the two agents, Womack and Howell, as his following comments indicate:

"Mary said that there was some people waiting down the road that wanted to buy some grass from me. . . . (R. 109)

". . . I decided, 'Okay, I will go ahead and sell it to them.' (R. 110)

"I pulled up beside them — pulled over to their car. I said, 'Follow me.' And I took off . . . We made the transaction . . . (R. 110)

"They wanted to buy some more. They came back and approached me and wanted to buy some more marijuana." (R. 114-115)

Thus, Hagendorfer readily admitted that he sold the marijuana to both agents.

Further, the Petitioner admits in his brief in support of his Petition for Writ of Certiorari that the evidence at trial showed one joint transaction with both William Womack and Roland Howell as vendee. (Petitioner's Brief, pp. 42-43)

In accord with the evidence, the Alabama Court of Criminal Appeals rejected the Petitioner's claim of a fatal variance, finding that the proof at trial affirmatively established that both officers participated in the purchase from the Appellant and noting that each officer was handed at least one bag of marijuana at the time of the sale. (p. 9a of Petitioner's Brief)

The Petitioner in this case was charged in the indictment with selling marijuana to William Womack and was convicted for selling marijuana to William Womack. The mere fact that the proof at trial shows that another person was involved in the sale does not make the indictment invalid.

Both Alabama and federal cases hold that a variance is not fatal unless the indictment does not inform the defendant of the charges against him so that he can prepare his defense. Stated otherwise, for the variance to be material, it must be substantially misleading or injurious to the ac-

cused in his efforts to defend himself against the charge. See, e.g., *Blackmon v. State*, 46 Ala. App. 274, 240 So.2d 696, certiorari denied 286 Ala. 733, 240 So. 2d 699 (1970); *U.S. v. Freeman*, 514 F. 2d 1184 (C.A. Kan. 1975); *U.S. v. Quicksey*, 525 F. 2d 337 (C.A. W. Va. 1975); *Rathbun v. U.S.*, 236 F. 2d 514, (C.A. Colo. 1956) affirmed 78 S. Ct. 161, 355 U.S. 107, 2 L. Ed. 2d 134, rehearing denied 78 S. Ct. 363, 355 U.S. 925, 2 L. Ed 355.

These decisions are in accord with Rule 52(a) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., which reads as follows:

> "(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

The record reflects no confusion by the Petitioner concerning the charges against him. In fact, he admits to selling marijuana to both men. (R. 110, 114-115) Further, he waived any objection he may have had by failing to demur to the indictment or raise its sufficiency at trial. *Sullivan v. State*, 38 Ala. App. 340, 83 So. 2d 259 (1959).

The Petitioner claims that the variance was fatal because it exposed him to the danger of a second trial for the sale of marijuana to Roland Howell. The Petitioner runs no such risk. The record bears out the fact that the sale to Womack and Howell was a single transaction, and the Court of Criminal Appeals makes this fact clear in its opinion, as follows:

> "We are of the opinion that this was one joint transaction, and the evidence was properly admitted as to the officers, Womack and Howell. *Morrow v. State*, 52 Ala. App. 145, 290 So. 2d 209, cert. denied

> 292 Ala. 743, 290 So. 2d 213, and authorities cited therein."

Any variance between the indictment and the proof at trial was not material in that the rights of the Petitioner to defend himself and to avoid the risk of double jeopardy were in no way prejudiced.

V.

THE PETITIONER HAS NO STANDING TO CHALLENGE THE CONSTITUTIONALITY OF *DUIN V. STATE*.

The Petitioner attempts to challenge the constitutionality of *Duin v. State*, 288 Ala. 329, 260 So. 2d 602 (1972), on the premise that *Duin*, supra, authorizes inspecific indictments. Presumably, the Petitioner objects to the restatement in *Duin* of existing law that if the allegations in the indictment substantially follow the language of the statute creating the offense, such indictment is valid. In *Duin*, supra, which was also a case arising under the Alabama Controlled Substances Act, Title 22, § 58 (47) Code of Alabama, Recompiled 1958, as amended, the Court held that the indictment charging the defendant with the sale of marijuana was sufficient, even though it did not name the vendee, because it was framed in the words of the statute. The Court noted that the defendant had neither filed a demurrer nor otherwise challenged the legal sufficiency of the indictment and stated that it would therefore refrain from determining what effect a demurrer raising the omission of the name of the vendee would have had. Similarly, the Petitioner here filed no demurrer to the indictment, therefore, the effect of the *Duin* precedent, if any, would be that in the absence of a demurrer, an indictment following the language of the statute is valid.

In any event, the above discussion is really academic because *Duin*, supra, is not applicable to this case. *Duin*, supra, involved an indictment where the vendee was not named. There is no controversy involving *Duin* in this caseo, because here the vendee was named in the indictment on which the Petitioner was tried. Here, the indictment included more than was required by the statute. As stated earlier, the Petitioner was indicted and convicted for selling marijuana to William Womack. He was aware of the crime for which he was being tried. The indictment is not invalid simply because an additional person was involved in the transaction.

Thus, in the present case we do not reach the question of the validity of the rule that an indictment is valid if it follows substantially the language of the statute creating the offense. Although the Alabama Uniform Controlled Substances Act does not require as an element of the crime of selling controlled substances that the vendee be identified, the vendee was identified and named in the indictment in this case.

CONCLUSION

The petition for writ of certiorari to the Supreme Court of Alabama should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Walter Turner, one of the attorneys for the respondent, and a member of the Bar of the Supreme Court of the United States, and I, Linda C. Breland, one of the attorneys for respondent, hereby certify that on this 22 day of December, 1977, we did serve the requisite number of copies of the foregoing Brief and Argument of Respondent and Appendix on the Honorable J. Michael Druhan, Jr., whose address is Post Office Box 154, Mobile, Alabama 36601, attorney for petitioners, by mailing said copies to him at the aforesaid address with the postage prepaid.

Walter Turner

WALTER TURNER
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GENERAL OF ALABAMA

Linda C. Breland

LINDA C. BRELAND
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APPENDIX A

§ 12-16-9. Permitting separation of jury during trial upon consent of accused, prosecuting attorney, etc.; presumption as to separation of jury; questioning of or making of statement by accused, prosecuting attorney, etc., as to separation of jury in hearing the jury.—(a) If the accused and his counsel and also the prosecuting attorney, in any prosecution for felony, whether capital or non-capital, consent thereto in open court, the trial court in its discretion may permit the jury trying the case to separate during the pendency of the trial, whether the jury has retired or not. A separation so permitted shall not create a presumption of prejudice to that accused, but on the contrary it shall be prima facie presumed that the accused was not prejudiced by reason of the separation of the jury.

(b) It shall be improper for the trial court to ask the accused, counsel for the accused or the prosecuting attorney, in the hearing of the jury, whether he or they will consent to a separation of the jury pending the trial.

(c) It shall be improper for the accused, counsel for the accused or the prosecuting attorney to state to the trial court in the hearing of the jury that he or they consent to a separation of the jury pending the trial. (Acts 1943, No. 384, p. 358.)

APPENDIX B

Tit. 22, §258(47). Prohibited acts A; penalties.—(a) Except as authorized by this chapter, any person who possesses, sells, furnishes, gives away, obtains or attempts to obtain by fraud, deceit, misrepresentation or subterfuge or by the forgery or alteration of a prescription or written order or by the concealment of material fact or by use of false name or giving a false address controlled substances enumerated in schedules I, II, III, IV and V is guilty of a felony and, upon conviction, for the first offense may be imprisoned for not less than two nor more than fifteen years and, in addition, may be fined not more than $25,000.00; provided, that any person who possesses any marihuana for his personal use only is guilty of a misdemeanor and upon conviction for the offense, shall be imprisoned in the county jail for not more than one year, and in addition, shall be fined not more than $1,000.00; provided further, that the penalties for the subsequent offenses relating to possession of marijuana shall be the same as specified in the first sentence of this subsection.

(b) Any person who violates this section with respect to a counterfeit substance enumerated in schedules I through V is guilty of a felony and upon conviction, for the first offense may be imprisoned for not less than two nor more than fifteen years and may be fined not more than $25,000.00. (Act 1971, No. 1407, p. 2378, § 401.)